

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OHIO SECURITY INSURANCE
COMPANY, et al.,

Case No. 2:23-cv-01094-JAD-NJK

Plaintiff(s),

Order

v.

[Docket No. 55]

HI-TECH AGGREGATE, LLC, et al.,

Defendant(s).

Pending before the Court is Plaintiffs' motion for protective order. Docket No. 55. Defendant Hi-Tech filed a response in opposition. Docket No. 57. Plaintiffs filed a reply. Docket No. 58. With respect to the depositions of Hormel, Kievet, and VanderPol, the motion is properly resolved without a hearing. *See* Local Rule 78-1.¹ For the reasons discussed below, with respect to these depositions, the motion for protective order is **GRANTED** in part and **DENIED** in part.²

I. BACKGROUND

This is an insurance dispute in which Plaintiffs seek a declaration of non-coverage as to an underlying lawsuit. *See* Docket No. 1. The parties are before the Court on discovery disputes concerning depositions. *See* Docket No. 55.

II. STANDARDS

"The discovery process in theory should be cooperative and largely unsupervised by the district court." *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1219 (9th Cir. 2018). When an amicable resolution to a discovery dispute cannot be attained, however, a party seeking to avoid discovery may seek a protective order. Fed. R. Civ. P. 26(c). The party seeking to avoid discovery bears the burden of showing why that discovery should not be permitted. *V5 Techs. v. Switch*,

¹ The Court issued a separate order setting a hearing on the motion for protective order as it relates to the deposition of Robertson. *See* Docket No. 59.

² Given upcoming deposition dates, the Court advanced the briefing schedule. *See* Docket No. 56. The Court's discussion herein will be somewhat truncated in an effort to resolve the motion practice in prompt fashion.

1 *Ltd.*, 334 F.R.D. 306, 309 (D. Nev. 2019). “[A] strong showing is required before a party will be
 2 denied entirely the right to take a deposition.” *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429
 3 (9th Cir. 1975). “[B]road discretion is vested in the trial court to permit or deny discovery.”
 4 *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002).

5 **III. ANALYSIS**

6 **A. Jennifer Hormel**

7 Hi-Tech has abandoned its efforts to depose Jennifer Hormel vis-à-vis the served
 8 deposition notice. Docket No. 57 at 5. Accordingly, this aspect of the motion for protective order
 9 will be granted as unopposed.

10 **B. Tom Kievet**

11 Plaintiffs raise a number of arguments in their effort for Kievet to avoid sitting for
 12 deposition. Docket No. 55 at 16, 17-21. As Hi-Tech notes in response, however, *see, e.g.*, Docket
 13 No. 57 at 11, Plaintiffs expressly agreed to have Kievet sit for deposition so long as the deposition
 14 took place by remote means:

15 We previously agreed to forego the subpoena requirement if Hi-
 16 Tech would take their depositions via zoom and we remain willing
 17 to live up to that agreement. There is no reason, at all, why these
 18 depositions cannot move forward with zoom. There were no audio
 19 or video issues with the prior deposition by zoom. Any issues on
 20 your end with exhibits can easily be alleviated with a minimum of
 21 diligence and preparation by the deposing attorneys. Neither Mr.
 22 Greeley nor Mr. Kivet [sic] will be produced in Nevada. HiTech
 23 may choose whether it will take these depositions by zoom, in the
 24 location of the non-party fact witness, or not at all. Upon Hi-Tech’s
 25 agreement to take these depositions by zoom or at the witnesses’
 26 respective location, we will coordinate dates.

27 Docket No. 53-12 at 2-3 (footnote omitted).³ Moreover, Hi-Tech consented to taking this
 28 deposition remotely. *See, e.g.*, Docket No. 57 at 7 n.17; Docket No. 55 at 5. Courts routinely hold
 29 parties to their compromise positions taken during the conferral process. *See, e.g., D.S. v. Clark*

30 ³ Plaintiffs strain credulity in asserting that there was an “offer, generally, to provide
 31 witnesses via Zoom” that somehow did not mean that they had agreed that Kievet would sit for a
 32 remote deposition. *See* Docket No. 55 at 6. Such an assertion is belied by the letter itself indicating
 33 that Plaintiffs would agree to “these depositions” taking place remotely and that the only loose end
 34 was coordinating dates. *See* Docket No. 53-12 at 2-3.

1 *Cnty. Sch. Dist.*, 2023 WL 3584256, *2 n.4 (D. Nev. May 22, 2023) (citing *Underwood v. O'Reilly*
 2 *Auto Enters., LLC*, 2022 WL 4359096, at *2 (D. Nev. Sept. 20, 2022)). Given the positions taken
 3 by the parties, Kievet's deposition will go forward by remote means.

4 The arguments with respect to Kievet also fail for a second, independent reason: Plaintiffs
 5 failed to timely seek relief prior to Kievet's scheduled deposition and their earlier motion for
 6 protective order was denied as untimely and improper. *See* Docket No. 54. A litigant cannot file
 7 a last-minute motion for protective order, have that motion denied, have the deponent violate his
 8 duty to appear at that deposition, and then file a renewed motion for protective order rearguing the
 9 same points that were just rejected as improperly presented. "Indeed, it would make little sense
 10 that a court would deny protection from an imminent deposition based on the untimeliness of a
 11 motion for protective order as simply a means to kick the can by allowing the movant to avoid the
 12 deposition and consequent sanctions based on the same untimely arguments raised at an even later
 13 date after the deposition was supposed to take place." *ProDox, LLC v. Prof. Doc. Servs., Inc.*, 341
 14 F.R.D. 679, 684 (D. Nev. 2022). Quite plainly, Plaintiffs' opportunity to try to avoid Kievet sitting
 15 for deposition has already come and gone.

16 Hence, Plaintiffs' arguments as to Kievet's deposition have been forfeited both by the
 17 compromise position taken by Plaintiffs during the conferral process and by Plaintiffs' failure to
 18 raise these arguments in timely fashion before the deposition was set to take place. Accordingly,
 19 this aspect of the motion for protective order will be denied.

20 C. Wes VanderPol

21 Plaintiffs argue that the deposition notice to Wes VanderPol is defective in that his
 22 deposition must be obtained through subpoena. *See, e.g.*, Docket No. 55 at 16-17.

23 A party may depose a person by serving "reasonable written notice." Fed. R. Civ. P.
 24 30(b)(1). "If a person is a party, a simple notice of deposition is sufficient to compel attendance,
 25 while a non-party's attendance can be compelled only by subpoena." *Jules Jordan Video, Inc. v.*
 26 *144942 Canada Inc.*, 617 F. 3d 1146, 1158 (9th Cir. 2010). "In the context of a corporate party, a
 27 natural person is deemed a party for Rule 30(b)(1) notice purposes if that person is the party's
 28 officer, director, or managing agent." *Nationstar Mtg., LLC v. Flamingo Trails No. 7 Landscape*

1 *Maintenance Ass'n*, 316 F.R.D. 327, 332 (D. Nev. 2016) (citing *Cadent Ltd. v. 3M Unitek Corp.*,
 2 232 F.R.D. 625, 628 n.1 (C.D. Cal. 2005)). The party seeking the deposition bears a modest burden
 3 in establishing the prospective deponent's status as a managing agent and close questions should
 4 be resolved in favor of allowing the deposition to proceed. *Calderon v. Experian Info. Solutions,*
 5 *Inc.*, 287 F.R.D. 629, 633-34 (D. Id. 2012).

6 VanderPol is a claims handler. Docket No. 55 at 16. Hi-Tech has provided no factual
 7 showing or meaningful argument that VanderPol could be construed as an officer, director, or
 8 managing agent. *See* Docket No. 57 at 10-11 (arguing that Kieviet and Robertson are properly
 9 considered managing agents, but omitting argument as to VanderPol). Hi-Tech has not met its
 10 modest burden of showing that this deposition could be obtained merely through notice, as opposed
 11 to a subpoena.⁴ Accordingly, this aspect of the motion for protective order will be granted.⁵

12 IV. CONCLUSION

13 For the reasons discussed above, the motion for protective order is **GRANTED** with
 14 respect to the depositions of Hormel and VanderPol, and the motion for protective order is
 15 **DENIED** with respect to the deposition of Kieviet. The deposition of Kieviet must take place by
 16 June 24, 2024.

17 IT IS SO ORDERED.

18 Dated: June 3, 2024

19
 20 
 Nancy J. Koppe
 United States Magistrate Judge

21
 22 ⁴ The parties dispute Plaintiffs' standing to argue VanderPol's nonparty status. Plaintiffs'
 23 assertion of standing is more aligned with the governing text, which contemplates a motion for
 24 protective order filed by a party "from whom discovery is sought." Fed. R. Civ. P. 26(c)(1)
 25 (emphasis added). By Hi-Tech serving a deposition notice (rather than a subpoena), Plaintiffs are
 effectively the parties from whom this discovery is sought. *See Cadent Ltd. v. 3M Unitek Corp.*,
 232 F.R.D 625, 628 (C.D. Cal. 2005).

26 ⁵ As VanderPol is a nonparty, the Court will not opine herein on the other arguments
 27 presented. *See Byrd Underground, LLC v. Automatic Data Processing, Inc.*, 2024 WL 95392, at
 28 *1 (D. Nev. Jan. 9, 2024) (D. Nev. Jan. 9, 2024) (noting that a party lacks standing to raise
 relevance or undue burden objections on behalf of a nonparty); *see also* Fed. R. Civ. P.
 45(d)(3)(A), (B) (motions to quash a subpoena must be filed in "the court for the district where
 compliance is required").